135

(2)

Supreme Court, U.S.
FILED
AUG 4 - 2009
OFFICE OF THE CLERK

No. 09-22

In The
Supreme Court of the United States

FREDERICK JELOVSEK,

Petitioner,

v.

PHIL BREDESEN, GOVERNOR OF TENNESSEE, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

ROBERT E. COOPER, JR.
ATTORNEY GENERAL & REPORTER

MICHAEL E. MOORE
SOLICITOR GENERAL

LYNDSAY FULLER SANDERS*
ASSISTANT ATTORNEY GENERAL
425 FIFTH AVENUE NORTH
P.O. BOX 20207
NASHVILLE, TN 37202-0207
(615)741-4087

**Counsel of Record*
Counsel for Respondents

August 4, 2009

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED FOR REVIEW

I. Whether discriminatory and protectionist laws in Tennessee's three-tier alcohol distribution system are immune from challenge on Commerce Clause grounds, contrary to the law of this Court and other circuits?

II. Whether the Sixth Circuit erred in failing to strike down the following provisions of state laws in violation of the Petitioner's right of equal access to the interstate wine market as protected by the Commerce Clause:

A. The laws that require in-state residency and presence to obtain a Tennessee wholesale or retail alcohol license, which laws restrict the Petitioner's access to a wide variety of wines offered by out-of-state vendors.

B. The law that prohibits direct shipment of wine to the Petitioner from out-of-state retailers, when the State allows him to purchase as much wine as he wants from in-state retailers.

C. The law that criminalizes the Petitioner's possession of wines purchased from out-of-state retail venders upon which Tennessee taxes have not been paid, when there is no mechanism to pay such taxes.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 4

I. CERTICRARI IS NOT WARRANTED BECAUSE, CONTRARY TO PETITIONER'S ASSERTION, THE SIXTH CIRCUIT DID NOT HOLD THAT THE CHALLENGED LAWS WERE IMMUNE FROM COMMERCE CLAUSE CHALLENGE. ... 4

II. MOST OF THE QUESTIONS PRESENTED BY PETITIONER HAVE BEEN RENDERED MOOT BY RECENT ACTS OF THE TENNESSEE LEGISLATURE, WHICHHAVE EFFECTIVELY AFFORDED THE PETITIONER ALL OF THE RELIEF THAT HE SOUGHT IN HIS COMPLAINT. 5

III. THE SIXTH CIRCUIT NEVER ADDRESSED TENNESSEE'S RESIDENCY REQUIREMENTS TO BECOME LICENSED LIQUOR WHOLESALERS AND RETAILERS, AND PETITIONER LACKED

STANDING TO CHALLENGE SUCH LAWS. 7

CONCLUSION 9

APPENDIX

Appendix A: 2009 Tenn. Pub. Acts Ch. 273 . . 1b

Appendix B: 2009 Tenn. Pub. Acts Ch. 348 . 10b

Appendix C: 2009 Tenn. Pub. Acts Ch. 434 . 16b

TABLE OF AUTHORITIES

CASES

Bacchus v. Imports, Ltd. V. Dias,
468 U.S. 263 (1984) 3

DeFunis v. Odegaard,
416 U.S. 312, 94 S.Ct. 1704 (U.S. 1974) 5

Granholm v. Heald,
544 U.S. 460 (2005) 1, 3, 4, 5

Lance v. Coffman,
127 S.Ct. 1194 (2007) 8

Liner v. Jafco, Inc.,
375 U.S. 301, 84 S.Ct. 391, 11 L.Ed.2d 347
(1964) 6

North Carolina v. Rice,
404 U.S. 244, 92 S.Ct. 402, 30 L.Ed.2d 413
(1971) 5

Powell v. McCormack,
395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491
(1969) 6

Sibron v. New York,
392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917
(1968) 6

STATUTES

28 U.S.C. § 1254 1

2009 Tenn. Pub. Acts Ch. 273 ..... 4, 6

2009 Tenn. Pub. Acts Ch. 348 ..... 4, 6

2009 Tenn. Pub. Acts Ch. 434 ..... 4, 6

OPINIONS BELOW

The October 24, 2008, panel opinion of the United States Court of Appeals for the Sixth Circuit, which affirmed, in part, and vacated, in part, the district court judgment, is reported at 545 F.3d 431. (Pet.App. 1a) The January 26, 2009, order of the Sixth Circuit denying rehearing en banc is not reported. (Pet.App. 43a) The order and memorandum opinion of the district court dismissing the petitioner's claim is reported at 482 F.Supp.2d 1013. (Pet.App. 20a)

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

Petitioner was one of several plaintiffs who sued the Governor and Attorney General of Tennessee, as well as the Executive Director of the Tennessee Alcoholic Beverage Commission, to raise a dormant commerce clause challenge to Tennessee laws governing the wine industry. As the Sixth Circuit noted, this lawsuit was one of several that were filed across the country in the wake of this Court's invalidation of laws in Michigan and New York that allowed only in-state wineries to sell and ship wine directly to consumers. *See* Pet. App. 3a (citing *Granholm v. Heald*, 544 U.S. 460 (2005)). Petitioner, an individual oenophile, sought better access to wine produced outside of Tennessee.

The Sixth Circuit accurately summarized the statutory scheme at issue in this lawsuit:

Tennessee employs what is commonly referred to as a three-tier system of alcohol regulation. The Tennessee Alcoholic Beverage Commission ("TABC") issues separate classes of licenses to manufacturers and distillers, wholesalers, and liquor retailers. Tenn. Code Ann. § 57-3-201. Unlicensed sales of alcohol are not permitted. *Id.* § 404(a). Manufacturers are limited to selling to wholesalers; wholesalers may sell to retailers, or in some cases other wholesalers; consumers are required to buy only from retailers. *Id.* § 404(b)-(d).

Statutes curtail the importation of alcoholic beverages, including wine, into the state, as well as the transportation of alcoholic beverages by individuals who are not licensees. These statutes seem to contradict each other, which creates a confusing web of seemingly applicable laws, and in its briefing and argument to the court the state did little to unravel the mystery. The district court found, and the state concedes, that a Tennessee resident may transport a greater quantity of wine purchased from a Tennessee winery as compared to wine purchased in another state.

Tennessee wineries are also subject to the three-tier system, and have their own class of license. *Id.* § 201(4). However, wineries are subject to further regulation, as well as being afforded some exceptions from the general liquor control statutes, through Tennessee's Grape and Wine Law. *Id.* § 207. The Grape and Wine Law, *inter alia*, restricts winery licenses to individuals who have been Tennessee

> residents for at least two years, or to corporations whose stock is wholly owned by Tennessee residents of at least two years; and permits Tennessee wineries which use a sufficient percentage of Tennessee-grown grapes in their wine production to serve complimentary samples to patrons, and to sell at retail directly to customers without any additional license. *Id.* § 207(d), (f). The Grape and Wine Law also provides that, notwithstanding the transportation restrictions in other statutes, wine purchased at a Tennessee winery may be transported within the state of Tennessee. *Id.* § 207(i).

(Pet.App. 3a)

The district court granted the defendants' motion for judgment on the pleadings, concluding that since both in- and out-of-state wineries are prohibited from selling and shipping wine directly to Tennessee consumers, this case was distinguishable from *Granholm*, where the laws in question denied only out-of-state wineries the ability to ship to consumers. (Pet.App. 23a) While the Sixth Circuit likewise upheld Tennessee's ban on the direct shipment of wine to consumers, it held unconstitutional Tennessee's Grape and Wine Law, which further regulates wineries. The court ruled that this law facially discriminates against out-of-state wineries, and favors in-state wineries, in violation of the Commerce Clause. (Pet. App.4a) (citing *Bacchus v. Imports, Ltd. V. Dias*, 468 U.S. 263 (1984)). The court remanded the case to the district court to afford the state an opportunity to defend the law's infirmities or, if necessary, to fashion an appropriate remedy. (Pet.App.17a)

After the Sixth Circuit rendered its decision, however, the Tennessee Legislature enacted three separate laws directly addressing the issues presented in this case. 2009 Tenn. Pub. Acts Ch. 273 eliminates any residency requirements for obtaining a winery license and eliminates all the domestic content requirements. (BIO App. 1b) 2009 Tenn. Pub. Acts Ch. 348 creates a direct shipper's license, which authorizes a licensee to sell and deliver wine by common carrier to Tennessee citizens over twenty-one (21) years old. (BIO App. 10b) Finally, 2009 Tenn. Pub. Acts Ch. 434 makes the quantity of wine that can be transported from wineries within and from wineries outside of the state consistent at five gallons in each instance. (BIO App. 16b)

REASONS FOR DENYING THE WRIT

I. CERTIORARI IS NOT WARRANTED BECAUSE, CONTRARY TO PETITIONER'S ASSERTION, THE SIXTH CIRCUIT DID NOT HOLD THAT THE CHALLENGED LAWS WERE IMMUNE FROM COMMERCE CLAUSE CHALLENGE.

Petitioner asserts that the Sixth Circuit held in this case "that the challenged laws are immune from Commerce Clause Challenge"; but this assertion misconstrues the Sixth Circuit decision. The Sixth Circuit held only that "Tennessee's decision to adhere to a *three-tier distribution system* is immune from direct challenge on Commerce Clause grounds." (Pet.App. 9a) (citing *Granholm*, 544 U.S. at 489) (emphasis added)). Furthermore, the court so held only in the context of the challenge to Tennessee's ban on direct shipment of alcohol and wine to consumers,

which, the court found, "applied equally to in-state and out-of-state wineries." (Pet.App. 9a) *See Granholm*, 544 U.S. at 489 ("State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent.")

In contrast, the Sixth Circuit found no such "immunity" in connection with the challenge to Tennessee's Grape and Wine Law, which offered a "multitude of exceptions" to Tennessee's wineries, and which the court thus found to be "facially discriminatory." (Pet.App. 15a) *Cf. Granholm*, 544 U.S. at 489 ("The instant cases, in contrast, involve straightforward attempts to discriminate in favor of local producers."). Viewed in the proper context, the decision of the Sixth Circuit does not conflict with the decisions of other circuits cited by petitioner. And, relying as it does on this Court's decision in *Granholm*, the Sixth Circuit decision certainly does not conflict with decisions of this Court.

II. MOST OF THE QUESTIONS PRESENTED BY PETITIONER HAVE BEEN RENDERED MOOT BY RECENT ACTS OF THE TENNESSEE LEGISLATURE, WHICH HAVE EFFECTIVELY AFFORDED THE PETITIONER ALL OF THE RELIEF THAT HE SOUGHT IN HIS COMPLAINT.

"[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *DeFunis v. Odegaard*, 416 U.S. 312, 316, 94 S.Ct. 1704, 1705 - 1706 (U.S. 1974) (quoting *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 404, 30 L.Ed.2d 413 (1971)). The inability of

the federal judiciary "to review moot cases derives from the requirement of Art. III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy." *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n. 3, 84 S.Ct. 391, 394, 11 L.Ed.2d 347 (1964); *see Powell v. McCormack*, 395 U.S. 486, 496 n. 7, 89 S.Ct. 1944, 1950, 23 L.Ed.2d 491 (1969); *Sibron v. New York*, 392 U.S. 40, 50 n. 8, 88 S.Ct. 1889, 1896, 20 L.Ed.2d 917 (1968).

In the wake of the Sixth Circuit decision in this case, the Tennessee Legislature passed three separate bills that have effectively rendered this lawsuit moot. 2009 Tenn. Pub. Acts Ch. 273 was passed on May 7, 2009, and was approved by the Governor on May 21, 2009. The specific purpose of Chapter 273 was to remedy the constitutional infirmities of the Grape and Wine Law cited by the Sixth Circuit in *Jelovsek*. (BIO App. 1b) Chapter 273 eliminated any residency requirements for obtaining a winery license and all of the domestic content requirements for any wine produced under such licenses. 2009 Tenn. Pub. Acts Ch. 348 was passed on May 21, 2009, and was approved by the Governor on June 4, 2009. (BIO App. 10b) Chapter 348 created a direct shipper's license, which authorizes a licensee to sell and deliver wine by common carrier to Tennessee citizens over twenty-one (21) years old. Finally, 2009 Tenn. Pub. Acts Ch. 434 was passed on May 26, 2009, and was approved by the Governor on June 12, 2009. (BIO App. 16b) Chapter 434 cleared up certain ambiguities with regard to conflicting transport amounts. *See* Pet.App. 18a. Now the number of gallons of wine that can be transported from wineries both within and without the state is the same and has been expanded to five gallons.

The enactment of these laws has provided the Petitioner with all of the relief that he sought in his complaint. Certiorari is thus unwarranted on questions that have been rendered moot.

III. THE SIXTH CIRCUIT NEVER ADDRESSED TENNESSEE'S RESIDENCY REQUIREMENTS TO BECOME LICENSED LIQUOR WHOLESALERS AND RETAILERS, AND PETITIONER LACKED STANDING TO CHALLENGE SUCH LAWS.

Petitioner couches his petition as if he had presented a self-standing claim specifically challenging the residency requirements of Tennessee's wholesaler and retailer licensing statutes. He did not. Petitioner challenged these requirements, to be sure, but as the district court observed, he did so only as part of his challenge to the entire regulatory scheme *as it pertained to the direct sale and shipment of wine* from out-of-state vendors to Tennessee residents. *See* Pet. App. 22a. Both the district court and the Sixth Circuit thus considered Petitioner's challenge to the Tennessee residency requirements as part and parcel of his challenge to Tennessee's ban on direct sales and shipments from out-of-state wineries to Tennessee consumers. Consequently, neither the district court nor the Sixth Circuit squarely addressed the constitutionality of these particular residency requirements.

Moreover, Petitioner could not mount a separate challenge to the residency requirements for obtaining a wholesaler or retailer license because he lacks standing to do so. As this Court has recently

reiterated, a plaintiff must show a "particularized harm" in order to establish standing.

> [A] plaintiff raising only a generally available grievance about government -- claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large -- does not state an Article III case or controversy.

Lance v. Coffman, 127 S.Ct. 1194, 1196-1197 (2007) (internal citations omitted). Throughout the course of this litigation, Petitioner has asserted nothing but his own interest in the purchase and consumption of wine. But there is nothing to indicate that Petitioner has been injured, or is likely to suffer a particularized injury not common to the public at large, because of the residency requirements for wholesaler and retail licensing. Petitioner is a consumer and a self-professed oenophile. He is not a producer, manufacturer, or retailer of wine, and he has not sought or been denied a Tennessee wholesaler license. The kind of injury he asserts -- unavailability of certain wines -- is not a particularized "injury"; it is a harm that he suffers in common with the public generally. Because of his lack of standing, Petitioner is in no position now to ask this Court to review an issue that neither of the lower courts saw fit to address.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,
ROBERT E. COOPER, JR.
Attorney General and Reporter
State of Tennessee

MICHAEL E. MOORE
Solicitor General

LYNDSAY FULLER SANDERS
Assistant Attorney General
Counsel of Record
425 Fifth Avenue North
P.O. Box 20207
Nashville, TN 37202-0207
(615)741-4087

Counsel for Respondents

APPENDIX

APPENDIX A

STATE OF TENNESSEE

PUBLIC CHAPTER NO. 273

SENATE BILL NO. 944

By Overbey, Ketron, Faulk, Yager, Stanley

Substituted for: House Bill No. 1549

By Casada, Shepard, McDaniel, Bone, Shipley, McCord, Sargent, Eldridge, Phillip Johnson, Lollar, Carr, Maggart, Weaver, Hensley, Fincher, Winningham, Tidwell, Bass, Matheny, Montgomery, Curtis Johnson, Watson, Litz, Mike Turner, Faulkner, Shaw, Stewart, Niceley

AN ACT to amend Tennessee Code Annotated, Title 57, Chapter 3, Part 2, relative to the "Grape and Wine Law".

WHEREAS, on October 24, 2008 in *Jelovsek, et al. v. Bredesen, et al.*, the United States Court of Appeals for the Sixth Circuit held that portions of Tennessee's Grape and Wine Law is discriminatory on its face and remanded the case to the United States District Court for further proceedings; and

WHEREAS, if Tennessee's Grape and Wine Law is left as it exists, and the district court ultimately holds that it violates the dormant commerce clause of the

Constitution, which appears likely, the judicial branch of government will amend the law to make it comport with the commerce clause; and

WHEREAS, if the General Assembly fails to address the defects in the law, the district court may strike portions of the law which would prevent wineries from operating in Tennessee; now, therefore,

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 57-3-207, is amended by deleting such section in its entirety and substituting instead the following:

§ 57-3-207.

(a) This section shall be known and may be cited as the "Grape and Wine Law". This section shall prevail over any conflicting statutory provision.

(b) A winery license may be issued as hereinafter provided for the manufacture of alcoholic vinous beverages, as defined in § 57-3-101, upon verified, written application to the commission on proper form herein authorized to be prescribed and furnished, and the application may be granted by the commission, subject to the restrictions of this chapter. Any winery license issued pursuant to this section shall authorize the holder thereof to manufacture, but not rectify, alcoholic vinous beverages, unless the holder thereof is also a distiller and/or rectifier holding a license to

distill and/or rectify alcoholic spirituous beverages, and such winery license shall authorize the holder thereof to place the same in containers or bottles. Out-of-state wineries may apply for and obtain a winery license issued in accordance with this section.

(c) Each applicant for a winery license issued pursuant to this section shall pay to the commission a one-time, nonrefundable fee in the amount of three hundred dollars ($300) when the application is submitted for review. Such license shall not be issued until a license fee of one hundred and fifty dollars ($150) is paid to the commission by the winery, but issuance of the license is exempt from the requirements of § 57-3-106. The commission shall deposit collections with the state treasurer to be earmarked for and allocated to the commission for the purpose of the administration and enforcement of the duties, powers and functions of the commission.

(d) No winery license shall be issued except to persons who have not been convicted, and whose officers and principals have not been convicted, within a period of five (5) years preceding application of any felony or any violation of any state or federal laws relating to alcoholic beverages.

(e) Notwithstanding the provisions of this section, a private individual in that person's own home may manufacture wine in an amount not in excess of that amount annually permitted as of March 22, 1973, by federal statute and

regulations relative to household manufacture and consumption, provided that the same is for personal consumption by members of that person's household.

(f)(1) A winery licensed under this section may serve wine without charge as complimentary samples for tasting at the winery and may sell wine at retail in sealed containers at the winery, but not for consumption on the bonded premises.

(2) A winery licensed under this section may donate wine without charge to nonprofit religious, educational or charitable institutions or associations.

(g) A winery licensed under this section may exchange wine in bulk with other wineries and no such bulk exchange, whether in return for wine or other consideration, shall be considered a sale subject to tax.

(h) In addition to its own wine, a winery licensed under this section located in Tennessee is authorized to sell the following items on the winery premises, and out-of-state wineries licensed under this section may sell such items as their state law permits:

(1) Juices or concentrates derived therefrom, or any agricultural products;

(2) Items used in home winemaking; and

(3) Other gift, tourism, or wine-related items as defined by regulations duly promulgated by the commission.

(i) A winery licensed under this section located in Tennessee may sell no more than five (5) cases or sixty (60) liters of wine to any single retail customer in one (1) day. It shall be legal for any purchaser of wine from a winery licensed under this section to transport into and within the State of Tennessee no more than five (5) cases or sixty (60) liters of wine in one (1) day. Any wine transported pursuant to this section must be accompanied by a bill of sale sufficiently identifying the nature, quantity, purchaser, date and place of purchase of the wine. Bills of sale purchased from out-of-state wineries licensed under this section must reflect that the wine was purchased for transport into Tennessee and that Tennessee taxes have been paid.

(j) Any licensee or other person who shall sell, furnish, dispose of, give, or cause to be sold, furnished, disposed of, or given, any wine in the State of Tennessee or for transport into the State of Tennessee, to any person under the age of majority as established by § 57-4-203(b), commits a misdemeanor.

(k) The commission is empowered and authorized to promulgate such rules and regulations as may be necessary to carry out the duties of the commission as provided in this section, including, but not limited to, procedures governing the production, sale and

transportation of wine. The Commissioner of Revenue shall establish procedures governing the keeping of records for tax purposes and the payment of taxes by a winery licensed hereunder, and for any failure to comply with such procedures, the commissioner shall notify the commission, which is authorized to revoke or suspend the license of any winery.

(l) It is the duty of the Commissioner of Agriculture to disseminate the best information available as to the methods of cultivation of crops which may be utilized in Tennessee for the production of wine and the methods of making such wines. It is also the duty of the commissioner to establish reasonable procedures requiring proper sanitary conditions about the winery and to certify that these conditions have been met before the commission shall issue any license. The commissioner shall establish reasonable procedures requiring the process of producing wine to be carried on under proper sanitary conditions and in a sanitary manner, and for any failure to comply with such procedures, the commissioner shall notify the commission, which is authorized to revoke or suspend the license of any winery.

(m)(1) Any nonprofit association organized to encourage and support grape growing and winemaking with ten (10) or more wineries licensed under this section as members shall be allowed to hold not more than eight (8) wine festivals per calendar year. Each festival shall not exceed a period of seventy-two (72) hours.

(2) Any winery licensed under this section participating in a festival authorized by this subsection (m) shall be allowed to transport, serve and offer complimentary samples of their wines for tasting at such festival. The complimentary sample size shall be restricted to a one-ounce (1 oz.) serving with only one (1) sample per person for each type of wine. Any person serving wine at such festival shall possess a server permit from the commission as described in Part 7 of this chapter.

(3) Any winery licensed under this section participating in a festival authorized by this subsection (m) shall be allowed to transport wine produced by such winery to sell at the festival for consumption off-premises.

(4)(A) Any nonprofit association authorized by this subsection (m) to hold a wine festival shall apply for a special occasion license as defined in § 57-4-102, in order for participating wineries licensed under this section to serve complimentary samples as described in subdivision (m)(2) and to sell wine produced by such wineries for consumption off-premises.

(B) Notwithstanding the provisions of § 57-4-102(30)(A), a special occasion license issued for a wine festival authorized by this subsection shall be for the duration of such festival for which

application is made for a period not to exceed seventy-two (72) hours. A special occasion license issued pursuant to this subsection shall only be available upon the payment of the fee as required by law for each separate day of the festival.

(C) A nonprofit association authorized to conduct a wine festival pursuant to this subsection (m) shall be permitted to hold such festival in any municipality or county of the state in the manner provided in subdivision (m)(5).

(5) A nonprofit association, as defined in subdivision (m)(1), is authorized to conduct a wine festival pursuant to this subsection (m) in a municipality or county of this state which has approved the sale of alcoholic beverages or has a licensed winery located in such municipality or county, subject to complying with all permit requirements of such municipality or county, and in all other municipalities or counties upon receiving approval of the legislative body of such municipality or county to hold such a festival at a location and in such manner authorized by such legislative body.

(n) If any provision of this act or application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 2. This act shall take effect upon becoming a law, the public welfare requiring it.

PASSED: May 7, 2009

/s/ Ron Ramsey
RON RAMSEY
SPEAKER OF THE SENATE

/s/ Kent Williams
KENT WILLIAMS, SPEAKER
HOUSE OF REPRESENTATIVES

APPROVED this 21st day of May 2009

/s/ Phil Bredesen
PHIL BREDESEN, GOVERNOR

APPENDIX B

STATE OF TENNESSEE

PUBLIC CHAPTER NO. 348

SENATE BILL NO. 166

By Stanley, Ketron, Johnson

Substituted for: House Bill No. 1155

By Shepard, Lundberg

AN ACT to amend Tennessee Code Annotated, Title 57, Chapter 3, relative to wine shipment.

WHEREAS, the Federal Trade Commission issued a staff report in 2003 finding that, banning interstate direct shipments, states limit consumers' access to thousands of labels from smaller wineries; and

WHEREAS, the FTC report further found that states that permit interstate direct shipping generally report few or no problems with shipments to minors; and

WHEREAS, the FTC report further stated that states that have sought to achieve voluntary compliance with their tax laws report few, if any, problems with tax collection; now, therefore,

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 57, Chapter 3, Part 2, is amended by adding the following as a new section:

57-3-217.

(a) Any person, firm or corporation which holds a federal basic permit pursuant to the Federal Alcohol Administration Act and is in the business of manufacturing, bottling or rectifying wine, may apply to the commission for a direct shipper's license under this section.

(b) A direct shipper, meeting the requirements of this section, shall be authorized to make sales and delivery of wine, as defined in § 57-3-101(20), by common carrier, to the citizens of this state over the age of twenty-one (21) who have purchased such wine directly from the direct shipper, subject to the limitations and requirements imposed by this section.

(c) As a condition to the issuance of a direct shipper's license as authorized in this section, an applicant for such license must satisfy the following conditions:

(1) Pay to the commission a one-time non-refundable fee in the amount of three hundred dollars ($300) when the application is submitted for review. A direct shipper's license under this section shall not be issued

until the applicant shall have paid to the commission the annual license fee of one hundred fifty dollars ($150).

(2) Execute a consent to jurisdiction and venue of all actions brought before the commission, any state agency or the courts of this state, such that any and all hearings, appeals and other matters relating to the license of such direct shipper shall be held in the State of Tennessee.

(3) Acknowledge, in writing, that it will contract only with common carriers which agree that any delivery of wine, made in this state, shall be by face-to-face delivery and that deliveries will only be made to individuals who demonstrate that such individuals are over the age of twenty-one (21) years, and which individuals sign upon receipt of such wine.

(d)(1) No direct shipper may ship more than a total of nine (9) liters of wine to any individual during any calendar month nor shall such shipper ship more than twenty-seven (27) liters of wine to any individual in any calendar year.

(2) No direct shipper may ship wine to an address that is located in a jurisdiction that has not authorized the sale of alcoholic beverages by local option referendum pursuant to § 57-3-106.

(3) Any shipment of wine pursuant to this section shall be made only in containers which clearly indicate on the exterior of the container,

visible to a person at least three feet (3') away, that the container "CONTAINS ALCOHOL: SIGNATURE OF PERSON AGE 21 OR OLDER REQUIRED FOR DELIVERY".

(e)(1) A direct shipper shall be responsible for remitting all sales taxes due resulting from any sale made under this section. In addition to all sales taxes imposed upon such sale, a direct shipper shall remit the gallonage tax as imposed by § 57-3-302.

(2) The taxes levied on sales made by a direct shipper as authorized by this section shall become due and payable on the first day of each month following the month during which such sales occur, and shall become delinquent if not paid on or before the 20th day of each such following month. For the purpose of ascertaining the amount of tax due, it is the duty of any direct shipper licensed pursuant to this section to transmit to the Commissioner of Revenue appropriate returns on forms prescribed by the commissioner.

(3) Upon request of the commission or its designated agent, any direct shipper licensed pursuant to this section shall provide to the commission, under penalty of perjury, a list of any wine shipped to an address within this state, including the addressee.

(4) The commission may enforce the requirements of this section by administrative action, may suspend or revoke a direct shipper's

license, and may accept an offer in compromise in lieu of suspension.

(5) A direct shipper that is found to have violated any of the provisions of this title, in addition to any fine imposed by the commission, shall reimburse the commission for all costs incurred in connection with the investigation and administrative action, including the out-of-pocket costs and reasonable personnel costs.

(6) No direct shipper may avoid liability under this section by subcontracting with a third party to perform its obligations required pursuant to this section.

(f) The commission and the Department of Revenue are authorized to promulgate rules and regulations which may be necessary to implement this act, in accordance with Title 4, Chapter 5.

(g)(1) It is an offense for a person who does not possess a direct shipper's license to ship wine to residents of this state.

(2) A violation of subdivision (1) is a class E felony, punishable by a fine only.

SECTION 2. Tennessee Code Annotated, Section 57-3-201, is amended by deleting the word "and" from the end of subdivision (3); by deleting the period at the end of subdivision (4) and substituting instead the language "; and", and by adding the following language as a new subdivision (5):

(5) Direct shipper's license.

SECTION 3. Tennessee Code Annotated, Section 57-3-402(b), is amended by deleting the first word, "No", and by substituting instead the language "Except as provided in § 57-3-217, no".

SECTION 4. For purposes of rulemaking, this act shall take effect upon becoming a law, the public welfare requiring it; for all other purposes this act shall take effect July 1, 2009, the public welfare requiring it.

PASSED: May 21, 2009

/s/ Ron Ramsey
RON RAMSEY
SPEAKER OF THE SENATE

/s/ Kent Williams
KENT WILLIAMS, SPEAKER
HOUSE OF REPRESENTATIVES

APPROVED this 4th day of June 2009

/s/ Phil Bredesen
PHIL BREDESEN, GOVERNOR

APPENDIX C

STATE OF TENNESSEE

PUBLIC CHAPTER NO. 434

HOUSE BILL NO. 1160

By Representatives Fraley, Ulysses Jones, Shepard, Odom

Substituted for: Senate Bill No. 1184

By Senator Haynes

AN ACT to amend Tennessee Code Annotated, Title 39, Chapter 17, Part 7 and Title 57, Chapter 3, relative to transportation of alcoholic beverages.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 39-17-703(a), is amended by deleting the language "does not have affixed to it a proper state of Tennessee revenue stamp" and substituting instead the language "has not had all taxes attributable to such intoxicating liquor paid".

SECTION 2. Tennessee Code Annotated, Section 39-17-703(b), is amended by deleting the language "that does not have a proper state of Tennessee revenue stamp affixed thereto" and substituting

instead the language "which is not accompanied by a receipt or documentation from an entity holding a license issued under §§ 57-3-204, 57-3-203, or 57-3-207".

SECTION 3. Tennessee Code Annotated, Section 57-3-102, is amended by deleting the section in its entirety and substituting instead the following:

Section 57-3-102.

(a) It is lawful to manufacture, store, sell, distribute and purchase alcoholic beverages or wine subject to proper licensing, payment of taxes, compliance with the limitation, regulations and conditions provided in this chapter, in counties or municipalities of this state which, by local option elections so permit as hereinafter provided.

(b) It shall be lawful for an individual to transport up to five gallons (5 gals.) of alcoholic beverages or wine for personal or household use of such individual in counties or municipalities which have not permitted the sale of alcoholic beverages or wine by local option elections as hereinafter provided and amounts in excess of five (5 gals.) if accompanied by a receipt or other documentation demonstrating legal purchase or transport from an entity licensed under §§ 57-3-203, 57-3-204 or 57-3-207.

SECTION 4. Tennessee Code Annotated, Section 57-3-207(i), is amended by adding the following language as a new sentence at the end of the subsection:

Any person transporting such wine in excess of five gallons (5 gals.) shall have with such shipment a receipt or other documentation demonstrating that the wine was purchased from a winery as licensed herein.

SECTION 5. Tennessee Code Annotated, Section 57-3-304(b), is amended by deleting the language "three gallons (3 gals.)" and substituting instead the language "five gallons (5 gals.)".

SECTION 6. Tennessee Code Annotated, Section 57-3-401, is amended by deleting the section in its entirety and substituting instead the following:

Section 57-3-401.

(a)

(1) It is an offense for any person, firm or corporation, other than a common carrier or entity licensed under this title, to transport, either in person or through an agent, employee or independent contractor, untaxed alcoholic beverages or wine as defined in § 57-3-101 within, into, through or from the state of Tennessee in quantities in excess of five gallons (5 gals.). Except as provided in § 57-3-103(b) authorizing a person to store alcoholic beverages intended for a person's personal or social use, it is an offense for any person, firm, corporation or association to possess untaxed alcoholic beverages or wine in quantities in excess of five gallons (5 gals.). A violation of this subdivision (1) is a Class E felony.

(2) Any person, firm, corporation, or association transporting any alcoholic beverages or wine within or into this state shall bear the burden of proof that the taxes imposed by this title on alcoholic beverages or wine have been paid. A receipt or other documentation demonstrating legal purchase or transport from an entity licensed under §§ 57-3-203, 57-3-204 or 57-3-207 shall be adequate proof that such taxes have been paid.

(b)

(1) It is an offense for any person, firm, corporation or association to import, ship, deliver or cause to be imported, shipped or delivered into this state any alcoholic beverages upon which the tax imposed by this title has not been paid or where such transportation is not authorized under this title to an entity possessing a license issued under this title. A violation of this subdivision (1) is a Class E felony.

(2) Except as provided in § 57-3-207 for purchases made by an individual at a winery licensed pursuant to such section, and notwithstanding the prohibition in subdivision (b)(1), it shall be lawful for any individual to transport not more than five gallons (5 gals.) of alcoholic beverages or wine into or within this state for the personal or household use of that individual.

SECTION 7. Tennessee Code Annotated, Section 57-3-402(d), is amended by deleting the language

"three gallons (3 gals.)" and substituting instead the language "five gallons (5 gals.)".

SECTION 8. Tennessee Code Annotated, Section 57-3-403(a), is amended by deleting the language "three gallons (3 gals.)" and substituting instead the language "five gallons (5 gals.)".

SECTION 9. Tennessee Code Annotated, Section 57-3-403(a), is further amended by inserting in the introductory sentence after the words "with this section" and before the colon ":" the language "or as otherwise permitted in this chapter" and in subdivision (a)(2) by inserting after the language "of this section," the language "or as otherwise permitted in this chapter".

SECTION 10. Tennessee Code Annotated, Section 57-3-411(b), is amended by deleting the language "one gallon (1 gal.)" and substituting instead the language "five gallons (5 gals.)."

SECTION 11. Tennessee Code Annotated, Section 57-9-201(a), is amended by adding the language "in excess of five (5) gallons" after the language "alcoholic beverages of more than five percent (5%) alcohol"; and by deleting the language "purchased or obtained from a licensed Tennessee retailer or wholesaler" and by substituting instead the language "purchased or obtained from an entity holding a license issued under §§ 57-3-204, 57-3-203, or 57-3-207".

SECTION 12. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given

effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 13. This act shall take effect upon becoming a law, the public welfare requiring it.

PASSED: May 26, 2009

/s/ Kent Williams
KENT WILLIAMS, SPEAKER
HOUSE OF REPRESENTATIVES

/s/ Ron Ramsey
RON RAMSEY
SPEAKER OF THE SENATE

APPROVED this 12th day of June 2009

/s/ Phil Bredesen
PHIL BREDESEN, GOVERNOR